Now the power of a magistrate, or his duty, if I may say so, to put questions to an accused person not under oath is provided by sub-sections (i) and (ii) of section 256 of the Criminal Procedure Code which read as follows:

"(i) For the purpose of enabling the accused to explain any circumstances appearing in the evidence against him, the court may at any stage of a trial or an inquiry, without previously warning the accused, put such questions to him as the court considers necessary.

(ii) For the purpose of this section the accused shall not be sworn and he shall not render himself liable to punishment by refusing to answer such questions or by giving false answers to them, but the court may draw such inference from such refusal or answers as it thinks just."

The corresponding section in the Straits Settlements Code has been repealed. It is my opinion that this section is intended to be used when an accused person elects not to give evidence on his own behalf or where he had given evidence but it is discovered subsequently that he had omitted to explain certain circumstances that appear in the evidence against him. According to the section, the questions may be put at any stage of the trial but it was contended that that did not mean that the questions could be put after the case for the defence had been closed. I cannot agree with this interpretation. In my opinion the words "at any stage of the trial" must mean at any time between the commencement of the trial and the delivery of judgment.

In this connection, it must be noted that the corresponding Indian section, which is section 342 of the Indian Criminal Procedure Code of 1898, specifically lays down that the stage at which the questions should be put is after the close of the case for the prosecution and before the defence is called. Yet in *Paltu Goswami* v. *Ram Kumar Das*,[3] where a magistrate had questioned the accused after the case for the defence had been closed and before delivery of judgment and had offered an opportunity to the defence to examine further witnesses which they did not avail themselves of, it was held that the mere delay in questioning the accused under section 342 was an irregularity which was curable under section 537 of the Indian Criminal Procedure Code. Section 537 is almost similar to section 422 of our Code. It is quite true that in the instant case, the magistrate did not, after he had questioned the appellant, offer an opportunity to the defence to examine further witnesses, but the facts elicited were not in the nature of fresh evidence against the appellant to prove his guilt. In fact the statement by the appellant to the effect that he was not annoyed when P.W.2 threatened to strike him with a slipper about half an hour before the commission of the alleged offence is evidence in favour and not against the defence. It would therefore appear that the principle underlying the decision in *Paltu Goswami* v. *Ram Kumar Das, supra,* would apply with great force to the facts of this case.

However, the main issue is whether or not the failure of the magistrate to comply generally with the provisions of section 256 and particularly with the provisions of 256(i), in that his questions were not asked for the purpose of obtaining an explanation from the appellant of any circumstances appearing in the evidence against him, vitiated the trial. I think that the answer to the question must depend upon whether or not the appellant had been in any way prejudiced by the questions asked. It appears to be well settled in India that the omission to properly examine an accused person under section 342 is not necessarily fatal to the prosecution if the accused had not been prejudiced in any manner (vide *Raijaua* v. *The State* [4]). I fully concur with that view.

It is clear from the record that the magistrate had questioned the appellant with a view of getting him to admit a motive for causing hurt to P.W.2. Since the evidence adduced in this case to prove the charge against the appellant is direct and not circumstantial, the question of motive, except in relation to the assessment of the sentence to be passed in the event of a conviction, is irrelevant for the purpose of determining the guilt or innocence of the appellant. I therefore hold that the questions put by the magistrate to the appellant had not occasioned a failure of justice and that the irregularity is curable by section 422 of the Criminal Procedure Code.

The third ground of appeal is that the magistrate had misdirected himself on the law in regard to the principles to be applied in a defence of *alibi* and that he had not given reasons for not accepting the defence. This ground was not pursued at the hearing of this appeal and I will therefore say without giving any reason, that there is no substance in this ground of appeal.

The appeal against conviction is therefore dismissed and I shall now hear counsel on the appeal against the sentence.

Appeal dismissed.

Solicitors: *S. Seenivasagam & Sons.*

PAN KOK WAH v. PUBLIC PROSECUTOR

[A.Cr.J. (Ong Hock Thye F.J.) April 7, 1966]

[K.L. — Criminal Appeal No. 10 of 1966]

Customs and Excise — Possession of still — Difference between "possession" and "control" — Excise Act, 1961, ss. 17(1), 73 & 74.

In this case the appellant had been convicted of a charge which alleged that he had in his control a still

for distilling liquor. Section 17(1) of the Excise Act makes it an offence to keep or have in one's possession any still etc.

Held: it was not an offence under section 17(1) of the Excise Act, 1961, to have control, short of possession, of a still and therefore the conviction on this charge must be quashed.

Cases referred to:—

(1) *Bank of New South Wales* v. *The Commonwealth* (1948), 76 C.L.R. 1, at p. 385.

(2) *Dollfus Meig et Cie* v. *Bank of England* [1950] 1 Ch. 333, at p. 359.

CRIMINAL APPEAL.

S. Y. Chan for the appellant.

Abdul Hamid bin Azmi (Deputy Public Prosecutor) for the respondent.

Ong Hock Thye F.J.: The appellant was convicted in the Sessions Court at Kuala Kubu on the following charges:

(1) "That you Pan Kok Wah at about 11.50 a.m. on 5.11.1965 at house No. 201, New Village, Kalumpang, Selangor not being a person licenced under section 16(1) or exempted from licencing under section 16(2) or 17(4) of the Excise Act, No. 34 of 1961, knowingly had in your control apparatus for distilling dutiable goods, to wit, one complete still, thereby committing an offence under section 17(1) and punishable under section 74 of the said Act.

(2) That you Pan Kok Wah at the same time, date and place did have in your control goods, to wit, 1 bucket, 1 acid jar and 4 bottles containing 4½ gallons intoxicating liquor on which the Excise duty amounting to $66.17 leviable by law has not been proved to have been paid, thereby committing an offence under section 73(1)(a) of the Excise Act, No. 34 of 1961 and punishable under section 73(1)(i) of the said Act."

He was sentenced to a fine of $1,000 on the first charge, in default one year's imprisonment, and on the second charge to a fine of $700, in default six months imprisonment. He now appeals against his convicton and sentence.

At the outset I took the point, which both the president and counsel for the appellant appeared to have overlooked, that section 17(1) of the Excise Act, 1961 only makes it an offence knowingly to keep or have in one's possession any still etc. It is not an offence under section 17(1) knowingly to have control, short of possession, of a still. By contrast, section 73(1)(a) speaks of "possession, custody or control." Hence manifestly the appellant had been wrongly convicted, under the first charge, of contravening a provision in section 17(1) which is non-existent.

The distinction between "possession" and "control" is unmistakable. "Control", said Dixon J. (as he then was) in *Bank of New South Wales* v. *The Commonwealth*,[1] is "an unfortunate word of such wide and ambiguous import that it has been taken to mean something weaker than 'restraint', something equivalent to 'regulation'." In *Dollfus Meig et Cie* v. *Bank of England* [2] Somervell L.J. said that "control would . . . cover the right to tell the possessor what is to be done with the property."

The learned president therefore was in error in thinking that control is synonymous with possession. I accordingly allow the appeal on the first charge and quash the conviction. The appeal on the second charge, being withdrawn by counsel, is dismissed.

Order accordingly.

Solicitors: *Heng, Chen & Co.*

PACIFIC ENGINEERING LTD. v. HAJI AHMAD RICE MILL LTD.

[O.C.J. (Gill J.) April 7, 1966]

[K.L. — Civil Suit No. 754 of 1963]

Tort — Nuisance — Injunction to restrain nuisance — Public nuisance — Claim for damages — Specific Relief (Malay States) Ordinance, 1951, s. 52.

The plaintiff brought an action for an injunction to restrain the defendants from (a) burning rice husks in the compound of their premises; (b) bringing or permitting to remain on their premises rice husks to such quantity and in such manner as to cause a danger from fire to the plaintiff's premises; and (c) dumping or permitting to be dumped on their premises rice husks in such manner that by being carried by wind or otherwise to the plaintiff's premises they cause injury to the plaintiff's property or their employee, invitees and servants. There is also a claim for damages.

Held: (1) the plaintiffs have produced ample evidence to show injury to property and interference with personal comfort caused by the smoke, ashes, dust and rice husks which emanate from the defendant's premises and that these constitute a nuisance in law;

(2) in the circumstances of this case the plaintiffs were entitled to damages and and injunction against the defendants.

Cases referred to:—

(1) *Vanderpant* v. *Mayfair Hotel Co. Ltd.* [1930] 1 Ch. 138, 153.

(2) *Sedleigh-Denfield* v. *O'Callaghan* [1940] A.C. 880, 913.

(3) *Tipping* v. *St. Helen's Smelting Co.* (1865), L.R. 1 Ch. App. 66.

(4) *Lambton* v. *Mellish, Lambton* v. *Cox* [1894] 3 Ch. 163.

(5) *Rapier* v. *London Tramways Co.* [1893] 2 Ch. 588.

CIVIL SUIT.

S. D. K. Peddie (*James Puthuchery* with him) for the plaintiffs.

Eugene Lye for the defendants.

Cur. Adv. Vult.

Gill J.: This is an action for an injunction to restrain the defendants and their agents from (a) burning rice husks in the compound of their premises, (b) bringing or permitting to remain on their premises rice husks in such manner as to cause a danger from fire to the plaintiffs' premises and (c) dumping or permitting to be dumped on their premises rice husks